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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

KENNETH JAY WILSON,
Petitioner

v.

LEWIS YAKLICH, et al., MARY SANFORD, et al., and the
UNITED STATES OF AMERICA
Respondents

On Petition for A Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert T. Biskup
(*Counsel of Record*)
Jose L. Patiño
John M. Thomas
Ford Pro Bono Volunteers
Three Parklane Boulevard
Suite 1400 West
Dearborn, MI 48126-2568
(313) 248-7734

Counsel for Petitioner

QUESTIONS PRESENTED

1. Is an indigent prisoner's right of access to the courts in the context of a 42 U.S.C. § 1983 claim a "fundamental constitutional right" (as held by the United States Court of Appeals for the Sixth, Seventh and Eighth Circuits), or merely a "privilege" (as held by the United States Court of Appeals for the Fifth, Tenth and Eleventh Circuits)?

2. Can Congress consistent with Fifth Amendment Equal Protection revoke the fundamental constitutional right of court access for indigent prisoners (through § 1915(g) of the Prison Litigation Reform Act), while exempting from such punishment other similarly-situated persons (*non-indigent* prisoners and indigent *non-prisoners*) by creating a nonrebuttable presumption that civil lawsuits are frivolous when brought by indigent prisoners with three prior unsuccessful lawsuits?

3. Can dismissals of actions entered prior to the enactment of the PLRA be retroactively counted toward the "three strikes" referred to in § 1915(g) without violating constitutional due process?

4. Whether the Sixth Circuit erred in adopting a new, unsupported standard of liability for Eighth Amendment condition-of-confinement claims for emotional or psychological injuries without giving the *pro se* plaintiff an opportunity to amend his complaint to meet that standard.

5. Whether the Sixth Circuit erred in dismissing Wilson's claim for injunctive relief in violation of this Court's holding in *Helling v. McKinney*, 509 U.S. 25 (1993).

PARTIES TO THE PROCEEDING

These are the parties to the proceedings in the United States Court of Appeals for the Sixth Circuit:

Kenneth Jay Wilson, Plaintiff/Appellant
Lewis E. Yaklich, Defendant/Appellee
Richard Hall, Defendant/Appellee
Dennis Baker, Defendant/Appellee
Reginald A. Wilkinson, Defendant/Appellee
Shirley Pope, Defendant/Appellee
George V. Voinovich, Defendant/Appellee
Mary Sanford, Defendant/Appellee
Officer Stephens, Defendant/Appellee
William Haggy, Defendant/Appellee
Officer Parker, Defendant/Appellee
Paul Thompsan, Defendant/Appellee
United States of America, Intervenor/Appellee

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Jay Wilson hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 148 F.3d 596 and is reprinted in the Appendix. The order of the court of appeals denying rehearing *en banc* is contained in the Appendix. The opinions and orders of the district court are contained in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1998. A timely Petition for Rehearing *en banc* was denied on July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides: "[N]or shall any person... be deprived of life, liberty, or property, without due process of law. . . ."

The Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g), Pub. L. No. 104-134, 110 Stat. 1321 (Apr. 26, 1996) provides: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the

prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

STATEMENT OF THE CASE

A. Introduction

In 1892, Congress enacted an *in forma pauperis* statute (28 U.S.C. § 1915) "to ensure that indigent litigants have meaningful access to the federal courts." *Adkins v. E.I. Dupont de Nemours & Co.*, 335 U.S. 331, 342-43 (1948). More than 100 years later, Congress passed the Prison Litigation Reform Act of 1995 (PLRA), including the draconian "three strikes and you're out" provision, 28 U.S.C. § 1915(g) ("§ 1915(g)"), which precludes the filing of *in forma pauperis* civil actions by a prisoner who has had actions dismissed on three prior occasions for failure to state a claim upon which relief may be granted, or as frivolous or malicious.

This case brings to the forefront the constitutionality of § 1915(g) and its sweeping implications for indigent prisoners with three qualifying "strikes." In the context of Equal Protection and Due Process challenges, the United States Court of Appeals for the Sixth Circuit agreed with Petitioner that there is a fundamental constitutional right of access to the courts in the context of this 42 U.S.C. § 1983 claim and that §1915(g) "could be deemed unconstitutional" if it "restrict[ed] the right to have arguably meritorious claims reviewed." (App. 28) However, applying with-

out explanation a rational basis standard of review, the court upheld the statute's constitutionality and left Petitioner without access to federal court. The Sixth Circuit also rejected Petitioner's argument that § 1915(g) could not constitutionally be applied retroactively, and it upheld the district court's dismissal on the merits of a related (and consolidated) Eighth Amendment case, as described below.

B. Proceedings in the District Court

This petition arises out of two actions filed by Plaintiff-Petitioner Kenneth Wilson ("Wilson"), an inmate of the Ohio state prison system, against employees of the Ohio Department of Rehabilitation and Correction ("Defendants"), *Wilson v. Yaklich, et al.* and *Wilson v. Sanford, et al.*

Wilson v. Yaklich. Wilson's complaint in *Yaklich* was filed *in forma pauperis* on November 16, 1995. The thrust of Wilson's *pro se* complaint is that Defendants violated Wilson's Eighth Amendment right against cruel and unusual punishment on at least two separate occasions because they knew that the "Aryan Brotherhood" was making threats against Wilson, they deliberately failed to take action to protect Wilson, and they instead disciplined Wilson for taking action ("refusing to lock") to protect himself. (App. 32-34)[1]

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[1] For example, paragraph 4 of the complaint alleges that "inmates from the 'Aryan Brotherhood' were forcing inmates into refusing to lock, and with the Defendant's knowledge of such actions, violated Plaintiff's Eighth and Fourteenth Amendment to be free from the ban on cruel and unusual punishment without due process of law."

The Complaint was filed *in forma pauperis* pursuant to 28 U.S.C. § 1915. On December 22, 1995, the district court, acting pursuant to 28 U.S.C. § 1915(d)(now § 1915(e)), dismissed the complaint without service of process on the defendants, without granting Wilson's request for appointment of counsel, without prior notice to Wilson, and without allowing Wilson an opportunity to amend. The district court found that Wilson's complaint was legally frivolous because it merely alleged that "defendants violated [Wilson's] right not to be subjected to cruel and unusual punishment because he was found to have violated an institutional rule." (App. 4)

Wilson moved for reconsideration. Still acting *pro se*, Wilson pointed out that the district court had "misconstrued Plaintiff's complaint as alleging that defendants charged him with rule violations and punish[ed] him." (App. 37) Rather, Wilson pointed out, his complaint "alleg[ed] that defendants were deliberate[ly] indifferent to Plaintiff's safety when the[y] were aware of the actions of the Aryan Brotherhood." (App. 36) In his motion, Wilson expressly asked that he be allowed to amend his complaint. (App. 37) The district court denied Wilson's motion on February 13, 1996 (App. 8), and Wilson filed an appeal with the United States Court of Appeals for the Sixth Circuit.

Wilson v. Sanford. On April 26, 1996 (after Wilson appealed the judgment in *Yaklich)* President Clinton signed into law the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321

(App. 33) Other paragraphs allege that Defendants failed even to investigate Wilson's request for "protective custody" and instead commenced disciplinary proceedings against him. (App. 33-34)

(Apr. 26, 1996)("PLRA"). Among other things, the PLRA provides that a prisoner may not bring a civil action *in forma pauperis* "if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g).

On November 4, 1996, Wilson filed seven applications to proceed *in forma pauperis* in connection with seven civil rights complaints that Wilson sought to file under 42 U.S.C. § 1983. The district court found that Wilson had filed at least three frivolous actions in the past. (App. 2) Therefore, relying on § 1915(g), the district court denied leave to proceed *in forma pauperis* and ordered that the clerk "not accept for filing any civil actions brought by Kenneth Wilson without the payment of the required filing fee." (App. 2) Wilson also appealed this ruling to the United States Court of Appeals for the Sixth Circuit.

C. Proceedings in the Court of Appeals

The Sixth Circuit appointed counsel to brief and argue Wilson's appeal in *Yaklich* and to argue his appeal in *Sanford*. After consolidating both cases for argument, the Sixth Circuit issued one opinion affirming the district court's orders in both cases. *Wilson v. Yaklich*, 148 F.3d 596 (6th Cir. 1998). (App. 10)

In *Yaklich*, the Sixth Circuit affirmed the district court's conclusion that Wilson's complaint was frivolous, but for reasons different than those given by the district court. Wilson's claim was frivolous, the Sixth

Circuit held, because Wilson failed to allege that the Aryan Brotherhood actually injured him physically or that he had suffered emotional or psychological injury. (App. 15) Further, relying on the Seventh Circuit's decision in *Babcock v. White*, 102 F.3d 267 (7th Cir. 1996)—a decision issued long after Wilson's complaint was filed—the Sixth Circuit held that Wilson's complaint would be frivolous even if he could allege an emotional or psychological injury, because Wilson had failed to allege failures on the part of prison officials that were sufficiently "egregious" to permit recovery absent a physical injury. (App. 15-16) Finally, the Sixth Circuit rejected Wilson's claim for injunctive relief because he was no longer incarcerated at the Mansfield Correctional Institution, where the threats from the Aryan Brotherhood occurred. (App. 16)

In *Sanford*, Wilson argued on appeal that he had zero qualifying lawsuits, or "strikes" when the PLRA became law in April 1996; rather, any dismissals of prior lawsuits filed by Wilson occurred prior to the enactment of the PLRA. Wilson thus argued that retroactive application of § 1915(g) would deny him due process of law because it would impair rights he possessed when he acted, increase his liability for past conduct, and impose new duties with respect to past transactions, contrary to this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Wilson also argued that, even if § 1915(g) could be applied retroactively, it violated Fifth Amendment Equal Protection and Due Process because it burdens the exercise of a fundamental constitutional right (access to the courts), is not tailored to serve the objective of deterring frivolous prison litigation, and contains classifications that do not rest on differences pertinent to the objective of deterring

frivolous prison litigation. Specifically, Wilson argued that 1) § 1915(g) singles out for punishment indigent prisoners and does not purport to address frivolous litigation brought by *non-indigent* prisoners or by indigent *non-prisoners*, 2) the class of punishable litigation under § 1915(g) is not limited to dismissals on frivolousness grounds; it includes dismissals on procedural grounds and for legal insufficiency, 3) the Statute creates a nonrebuttable presumption that any claim brought by an indigent prisoner with three "strikes" is frivolous, and 4) there are less restrictive means available that can achieve the objective of reducing frivolous litigation.[2]

The Sixth Circuit affirmed the district court's conclusion that § 1915(g) precluded him from proceeding *in forma pauperis.* First, the court held that dismissals of actions filed by Wilson before the adoption of the PLRA should be counted toward the "three strikes" calculation, even though the effect of counting pre-PLRA dismissals is to retroactively impose additional punishment on Wilson for filing those actions. (App. 19-22) Second, the Sixth Circuit agreed with Wilson that access to the courts is a fundamental right (consistent with the Seventh and Eighth Circuits, but contrary to the decisions of the Fifth, Tenth and Eleventh Circuits) (App. 24-25, 28), but it inexplicably failed to subject § 1915(g) to strict scrutiny. Instead, it rejected Wilson's equal protection and due process challenges to the statute, finding that § 1915(g) is rationally related to the congressional objective of less-

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[2] Wilson also maintains that § 1915(g) violates Article One prohibitions concerning Bills of Attainder and Ex Post Facto laws. The Sixth Circuit rejected those arguments as well.

ening the number of frivolous lawsuits filed at taxpayer's expense. (App. 23-24, 26) Finally, the Sixth Circuit held that § 1915(g) did not deny equal protection or due process because Wilson was not denied access to state court to present his federal claims under 42 U.S.C. 1983, only to federal court. (App. 25-26)

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States, Wilson seeks review of conflicting decisions among the United States courts of appeal as to the "fundamental" nature of the right of access to the courts, as well as conflicting decisions concerning the standard of liability applicable to Eighth Amendment condition-of-confinement claims involving emotional or psychological injury. Pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, Wilson seeks review of important constitutional questions of federal law that have not been but should be decided by this Court, including a) the constitutionality of the PLRA's "Three Strikes Provision," 28 U.S.C. § 1915(g), b) whether § 1915(g) can be can be applied retroactively consistent with Due Process, and c) whether the Sixth Circuit's decision in *Yaklich* violates this Court's holding in *Helling v. McKinney*, 509 U.S. 25 (1993).

I. CONGRESS CANNOT BAR A TARGETED GROUP OF INDIVIDUALS FROM EXERCISING CONSTITUTIONAL RIGHTS OF ACCESS TO THE COURTS WITHOUT JUDICIAL REVIEW SHOWING THAT SUCH EXTREME ACTION IS NECESSARY TO ACHIEVE A COMPELLING GOVERNMENTAL INTEREST AND NO LESS RESTRICTIVE MEANS ARE AVAILABLE

In enacting § 1915(g), Congress effectively foreclosed access to the federal courts for indigent prisoners who previously have filed three non-meritorious lawsuits or appeals. Under § 1915(g), prisoners are denied *in forma pauperis* status for *any* filings after their third "strike"—even meritorious filings involving recognized constitutional deprivations—unless the prisoner is in "imminent danger of serious physical injury." [3] As the Sixth Circuit noted its opinion: "The literal language of that portion of the PLRA forbids almost all attempts by indigent prisoners [with three strikes] to gain access to the federal courts in

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[3] Section 1915(g) does provide a purported "exception" when the prisoner has the luxury of filing an injunction action in situations involving "imminent danger of serious bodily injury." As a practical matter, it is impossible for a prisoner to take advantage of that exception, given the impossibility of predicting when one is going to be assaulted or attacked and, therefore, the lack of an opportunity to prepare and file court papers to enjoin prospective bodily injury, wait for the papers to be served on the defendant(s) and obtain a court hearing on the injunction request. Thus, while the "exception" bears mentioning, it cannot be said to mitigate the categorical harshness of the statute.

civil actions . . . ." (App. 18) That is because *in forma pauperis* status is a necessary prerequisite for virtually all prisoners to have access to the courts.

If a law burdens the exercise of a fundamental constitutional right, then the law will be subject to strict judicial scrutiny and will be presumed violative of due process and equal protection absent a compelling governmental justification. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). In contrast to the decisions of the Fifth, Tenth and Eleventh Circuits, the Sixth Circuit (consistent with the Seventh and Eighth Circuits) held in its opinion that Wilson has a fundamental constitutional right of access to the courts in the context of his claim brought pursuant to 42 U.S.C. § 1983. (App. 24, 28) *Accord Smith v. Shawnee Library System*, 60 F.3d 317, 322 (7th Cir. 1995); *DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988) ("A prison inmate's right of access to the courts is the most fundamental right he or she holds"); *Berdella v. Delo*, 972 F.2d 204, 209 (8th Cir. 1992) ("It is well established that an inmate has a constitutional right to meaningful access to the courts"); *But see* White *v. Colorado*, No. 97-1011, 1998 U.S. App. LEXIS 24933 (10th Cir. 1998) ("proceeding *in forma pauperis* in a civil case is a privilege, not a right"); *Rivera v. Allin*, 144 F.3d 719, 727 (11th Cir.), cert. dismissed, 1998 U.S. LEXIS 4633 (1998) ("proceeding IFP in a civil case is a privilege, not a right - fundamental or otherwise"); *Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir. 1997) (no fundamental constitutional right at stake in 42 U.S.C. § 1983 proceeding).[4] The Sixth Circuit went

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[4] In contrast to the holdings of the Fifth, Tenth and Eleventh circuits, the Sixth, Seventh and Eighth Circuit

on to say that Wilson's fundamental right of court access must be "adequate, effective and meaningful" under *Bounds v. Smith*, 430 U.S. 817 (1977). (App. 25) The Sixth Circuit also said that "[t]o the extent that any provisions of 28 U.S.C. § 1915(g) restrict the right to have arguably meritorious claims reviewed, those provisions could be deemed unconstitutional." (App. 28)

Notwithstanding its holding that § 1915(g) implicated Wilson's fundamental constitutional rights, the Sixth Circuit applied the wrong standard of review and concluded that the statute is rationally related to the objective of deterring frivolous prison litigation. The court should have subjected the statute to a more searching (i.e., strict scrutiny) standard of review. Wilson submits that, under the appropriate standard of review, it must be concluded that § 1915(g) is facially unconstitutional because it is not

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holdings concerning the "fundamental" nature of the right of access to the courts are supported by this Court's decisions in *Bounds v. Smith*, 430 U.S. 817, 828 (1977) and *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Indeed, the right of access to the courts has been held to require states to make transcripts available to indigents free of charge, *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956), compelled states to waive filing fees for indigent prisoners, *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959), affirmed the right to file habeas petitions even if prison officials deem them meritless, *Ex Parte Hull*, 312 U.S. 546 (1941), enforced access to fellow inmates who can help draft a complaint for a prisoner, *Johnson v. Avery*, 393 U.S. 483, 489 (1969), and required that prisoners have access to adequate law libraries or adequate assistance from persons trained in the law. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

narrowly tailored to serve the objective of deterring frivolous prison litigation and contains classifications that do not rest on differences pertinent to the objective of deterring frivolous prison litigation.

First, § 1915(g) singles out for punishment indigent prisoners and does not purport to address frivolous litigation brought by *non-indigent* prisoners or by indigent *non-prisoners*. When Congress enacted the *in forma pauperis* fee waiver provision of 28 U.S.C. § 1915, it extended to indigent prisoners and non-prisoners alike the right of meaningful access to the federal courts. Having chosen to provide all indigents with an opportunity to proceed *in forma pauperis*, Congress cannot arbitrarily impose conditions on some, but not all, persons entitled to seek *in forma pauperis status*, and require some, but not all persons to relinquish fundamental constitutional rights. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926) (Congress "may not impose conditions which require the relinquishment of constitutional rights").

Second, the class of punishable litigation under § 1915(g) is not limited to dismissals on frivolousness grounds; it includes dismissals on procedural grounds and for legal insufficiency.

Third, the statute creates a nonrebuttable presumption that any claim brought by an indigent prisoner with three "strikes" is frivolous. Indeed, it operates to punish the exercise of constitutional rights and, whatever may be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. *United States v. Jackson*, 390 U.S. 570, 582 (1968). At a minimum, the decision whether to limit the exercise of a person's fundamental rights must be undertaken on

a case-by-case basis; a nonrebuttable presumption tied to a simplistic baseball analogy does not discharge that constitutional responsibility.

Fourth, there are far less restrictive means that can achieve the objective of reducing frivolous litigation without needlessly trampling fundamental constitutional rights. One example is contained in the "deferred payment" provision of 28 U.S.C. § 1915(b), which has been interpreted as requiring prisoners to fund the cost of their litigation over time as their modest means allow. *See, e.g., In re Prison Litigation Reform Act*, 105 F.3d 1131 (6th Cir. 1997); *Floyd v. United States Postal Service*, 105 F.3d 274 (6th Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997). This provision ensures that litigants "will be required to assess the relative merits and risks of litigation before they proceed," but at the same time also ensures that "a prisoner without funds will not be denied access to federal court based on his poverty." *Hampton*, 106 F.3d at 1284-85. Many other less restrictive alternatives arise from the inherent power of the courts to impose appropriate restrictions on abusive in forma pauperis litigation. *See In re McDonald*, 489 U.S. 180 (1989).

In sum, where the deprivation of fundamental constitutional rights is at stake, one size does not fit all. The decision to limit the exercise of a person's constitutional rights (and to what extent) must necessarily be undertaken on a case-by-case basis to allow courts to give due regard to mitigating factors and to fashion a considered and proportionate sanction. The litigation "death penalty" of § 1915(g) cannot constitutionally be applied in a peremptory and uncircumscribed manner.

The court further erred in concluding that Wilson's exercise of his fundamental right of court access was not "burdened" by § 1915(g) because Wilson theoretically could have brought his lawsuit in the Ohio state court system. This is simply wrong.

When Congress enacted 42 U.S.C. § 1983, it concluded that strong federal policies demanded a federal forum and a federal remedy for the deprivation of federal rights under color of State authority. As the Court first stated in *Monroe v. Pape*, 365 U.S. 167, 180 (1961): "It is abundantly clear that one reason the legislation [42 U.S.C. § 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (emphasis supplied).[5]

As the Court recently said, 42 U.S.C. § 1983 addresses "the need for original federal-court ... control over the unconstitutional acts of state officials." *Ngiraingas v. Sanchez*, 495 U.S. 182, 189 (1990). The statute unquestionably creates a "specific and uniquely federal right," *Mitchum v. Foster*, 407 U.S. 225, 237 (1972), that Wilson is "entitled to [have] adjudicated in the federal courts." *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963). *Accord Haring v. Prosise*, 462 U.S. 306, 322 (1983) (there are "important interests in preserving federal courts as an

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[5] Certain holdings in *Monroe* were overruled, on other grounds, in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

available forum for the vindication of constitutional rights").

Therefore, in the context of Wilson's 42 U.S.C. § 1983 action, there can be no reasonable debate that the fundamental constitutional right of court access must be considered a right of federal court access. *See Smith v. Bennett*, 365 U.S. 708 (1961) (rejecting state's argument that filing fee which precludes access to state post-conviction remedies was constitutionally permissible because writ of habeas corpus was available in federal court).

II. RETROACTIVE APPLICATION OF § 1915(G) WOULD VIOLATE THE RULE OF *LANDGRAF V. USI FILM PRODUCTS*, 511 U.S. 244 (1994).

This petition presents an important question of federal law that should be settled by this Court: Whether dismissals of actions entered prior to the effective date of the PLRA may be counted toward the "three strikes" referred to in § 1915(g). The Sixth Circuit's decision to count pre-PLRA dismissals of other actions filed by Wilson is contrary to this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and denies Wilson due process of law.

In *Landgraf*, this Court held that a statute operates retroactively if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. Counting pre-PLRA claims and appeals does impair Wilson's right to request *in forma pauperis* status, a right "he possessed when he acted," and it also increases Wilson's liability for filing those claims and

appeals. Thus, counting the dismissals of Wilson's pre-PLRA claims and appeals constitutes a retroactive application of the PLRA, which is prohibited absent an express Congressional declaration that such a retroactive operation was intended.

The Sixth Circuit's only substantive explanation for finding the use of pre-PLRA strikes consistent with *Landgraf* was that: (1) "[t]o the extent that § 1915(g) does attach additional consequences to past actions . . . those consequences are not matters of substance, but only of the procedure required to pursue future claims"; and (2) federal courts have always been able to revoke *in forma pauperis* status, and § 1915(g) simply codifies the process. Both of these rationales are in conflict with *Landgraf*.

First, counting pre-PLRA claims and appeals quite clearly affects matters of substance, rather than procedure, because it effectively bars Wilson's cause of action by barring access to the courts. Wilson's cause of action "is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Thus, depriving Wilson of his cause of action deprives him of property rights protected by the Fourteenth Amendment.

Second, even if the PLRA affected only matters of procedure, *Landgraf* does not allow the panel to end the analysis, as it did, upon reaching that conclusion. The Supreme Court in *Landgraf* held only that retroactivity concerns are "diminished . . . in matters of procedures," and it cautioned that it was not "suggest[ing] that concerns about retroactivity have no application to procedural rules." 511 U.S. at 275 & n. 29. In fact, the Court in *Landgraf* concluded that the statute before it had procedural elements, but

was persuaded that "the type of legal change" suggested "would have an impact on private parties' planning." 511 U.S. at 282. Accordingly, *Landgraf* held, "if applied here, that Provision would attach an important new legal burden to that conduct," and as a consequence, it "does not apply to events antedating its enactment." 511 U.S. at 283. Here too, it is plain that the Sixth Circuit's decision attaches an important new burden to Wilson's pre-PLRA conduct, a burden that, if Wilson had known of it, might have persuaded him not to file some or all of his prior actions. Indeed, the rationale underlying § 1915(g) is that the potential bar to *in forma pauperis* will in fact operate to deter the filing of prisoner lawsuits. Thus, § 1915(g) cannot pass the *Landgraf* analysis even if it is found to be procedural in nature.

Finally, § 1915(g) does not just codify past practice. The new regime under the PLRA imposes a new *per se* bar that precludes any individualized judicial review. Even vexatious litigants in the pre-PLRA era were entitled to judicial review of the individual circumstances of the new claims they intended to make. Indeed, prior to the PLRA, if the district court had adopted a *per se* rule that denied *in forma pauperis* status to any prisoner who had had three prior suits dismissed for failure to state a claim, regardless of individual circumstances, that would have been reversible error. *See, e.g., Vinci v. Conrail*, 927 F.2d 287, 288 (6th Cir. 1991) ("mechanical" dismissal of case for failure to comply with pretrial order reversed; "[t]he failure to exercise discretion can also constitute an abuse of discretion"); *In re Horenstein*, 810 F.2d 73, 75-76 (6th Cir. 1986)("[F]ailure by the District Court to exercise its discretion by engaging in [an individualized] analysis amcunted to an abuse of discretion."); *McDonald v. Chicago Milwaukee Corp.*,

565 F.2d 416, 422 (7th Cir. 1977)("*Per se* rules often represent the abdication of judicial discretion rather than its informed exercise."); *Perez v. Ortiz*, 849 F.2d 793, 798 (2d Cir. 1988)("[T]he application of a *per se* rule to a matter that requires the exercise of discretion would constitute reversible error."). The refusal of the district court to exercise discretion in this fashion would have required reversal because it would have impaired Wilson's substantial right to "an individualized analysis" and an "opportunity to demonstrate why this case is unique, departs from the routine, or otherwise merits deviation from an instinctive norm." *In re Horenstein*, 810 F.2d 73, 76 (6th Cir. 1986). The Sixth Circuit's substantial reliance on the notion that the PLRA simply codified past practice, and could utilize pre-PLRA strikes for this reason, was erroneous.

III. THE SIXTH CIRCUIT ERRED IN ADOPTING A NEW STANDARD APPLICABLE TO SOME, BUT NOT ALL, CONDITION-OF-CONFINEMENT CLAIMS WITHOUT GIVING WILSON AN OPPORTUNITY TO AMEND HIS COMPLAINT TO MEET THAT NEW STANDARD

The Sixth Circuit in *Yaklich* effectively adopted a new standard of liability applicable only to Eighth Amendment condition-of-confinement claims involving emotional or psychological injuries, a standard of liability requiring proof of conduct on the part of prison officials that is more egregious than the "deliberate indifference" standard applicable to all other condition-of-confinement claims. Nothing in the decisions of this Court suggest a distinction between the standard of liability applicable to condition-of-confinement claims depending on the nature of the injury suffered.

Further, the Sixth Circuit's opinion in this regard conflicts directly with the D.C. Circuit's decision in *Chandler v. District of Columbia Dept. of Corrections*, 145 F.3d 1355 (D.C. Cir. 1998). But even if the Sixth Circuit were correct in adopting this new standard of liability for this one class of cases, it certainly should have given Wilson an opportunity to amend his complaint to meet this standard.

While Wilson's complaint in *Yaklich* is admittedly inarticulate, its gist is clear: Prison officials knew that a prison gang, the Aryan Brotherhood, was using "forc[e]" against Wilson to compel him to "refus[e] to lock," and prison officials, with deliberate indifference to Wilson's safety, refused to take action to protect him. The Sixth Circuit held that Wilson's complaint failed to allege a cause of action because (1) Wilson's complaint does not "even hint" that he had suffered emotional or psychological injury, and (2) even if he had alleged an emotional or psychological injury Wilson could not recover because "'extreme deprivations are required to make out a conditions-of-confinement claim' [for purely emotional harm] as opposed to an excessive force claim," and "[n]o such egregious failures on the part of prison officials have been established here." (App. 15) The court further held that Wilson's complaint was "frivolous" and "indisputably meritless" because Wilson could not "truthfully allege the existence of any injury justifying relief." *Id.* at 602. All of these conclusions are fundamentally flawed.

1. It is true that Wilson's complaint does not expressly allege an emotional or psychological injury, but such an injury is a fair inference from the *pro se* complaint which does allege two obviously traumatic incidents attributable to the threats of a prison gang

and the deliberate indifference of prison officials to those threats. Moreover, there is no basis for any conclusion that Wilson, if given the opportunity, could not expressly and truthfully allege such a psychological injury.

2. The standard of liability (i.e., the conduct of prison officials which can give rise to liability) varies depending upon whether the claimant is challenging his conditions of confinement or claiming that prison officials used excessive force. Contrary to the Sixth Circuit, however, the standard of liability does not vary depending upon the type of injury alleged. The standard of liability in condition-of-confinement cases is whether prison officials acted with "'deliberate indifference' to a substantial risk of serious harm to an inmate." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). The standard of liability in excessive-force cases is whether "force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillan*, 508 U.S. 1, 7 (1992).

3. Wilson's complaint is an obvious attempt to allege a condition-of-confinement claim and, read liberally, it adequately alleges that prison officials were deliberately indifferent to a substantial risk of serious harm. The Sixth Circuit in this case did not hold otherwise. By nevertheless rejecting Wilson's claim because he failed to allege conduct on the part of prison officials that was sufficiently "egregious" to impose liability for emotional or psychological harm, the Sixth Circuit effectively established a *third* standard of liability that (1) applies *only* to condition-of-confinement claims for purely emotional or psychological harm and (2) requires proof of something *more*

egregious than deliberate indifference to an inmate's safety.

Nothing in this Court's decisions supports the existence of such a third standard of liability for some but not all condition-of-confinement claims. The Sixth Circuit relied upon this Court's decision in *Hudson*, an excessive-force case, but the issue in *Hudson* was not the nature of the conduct that would give rise to liability but the nature of the compensable injury, i.e., whether the plaintiff alleging excessive force is required to prove a *significant* injury. This Court held that in an excessive-force case proof of a significant injury was not required, and in this context this Court did distinguish condition-of-confinement claims. 503 U.S. at 8-9.

> [E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society," [citation omitted] "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation."

503 U.S. at 9.

Thus, this Court in *Hudson* distinguished between excessive-force claims and condition-of-confinement claims, but it did not distinguish between condition-of-confinement claims involving physical injuries and those involving purely psychological injuries. Rather, it generally addressed *all* condition-of-confinement claims. In doing so, this Court could not have intended to impose a more severe standard than deliberate indifference, because it reaffirmed

that standard only two years later in *Farmer*. Thus, with respect to condition-of confinement claims, *Hudson* cannot be read to require a showing of conduct more "egregious" than deliberate indifference to a serious risk of harm.[6]

4. The Sixth Circuit's decision establishing a third standard of liability for condition-of-confinement claims involving psychological injury is in direct conflict with the decision in *Chandler v. District of Columbia Dept. of Corrections*, 145 F.3d 1355 (D.C. Cir. 1998), decided only four days after the Sixth Circuit's decision in this case. In that case, the plaintiff prisoner alleged a condition-of-confinement claim similar to the one alleged in this case. Specifically, the plaintiff alleged that threats had been made against his life, that he complained to prison officials, and that that their failure to respond to his complaints "left him vulnerable to attack and created an ongoing risk of injury." 145 F.3d at 1360.[7] The plaintiff alleged psychological injury, and the district court dismissed the condition-of-confinement claim against the prison officials for "failure to plead sufficient injury." *Id.* The D.C. Circuit held that it was error to dismiss the condition-of-confinement claim because the risk that the

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[6] *Hudson* might be read to suggest that proof of a *significant* injury is required in *all* condition-of-confinement cases, even though such proof is not required in excessive-force cases. Even so, there is nothing to suggest that Wilson, if given the opportunity to amend, could not truthfully allege a *significant* psychological injury.

[7] In *Chandler*, the threats were made by a prison guard; thus, the plaintiff also asserted an excessive force claim based on the threats themselves. *See* 145 F.3d at 1360.

"threat might be carried out, if left unaddressed ... could amount to a 'sufficiently substantial "risk of serious damage to [plaintiff's] future health"' to be actionable as an unconstitutional condition of confinement." 145 F.3d at 1361 (citation omitted).

Wilson has stated a claim virtually identical to the claim upheld by the D.C. Circuit in *Chandler*—a psychological injury resulting from the indifference of prison officials to serious threats to his physical well-being.

5. Finally, to the extent Wilson's complaint, construed liberally, still fails to plead the facts necessary for him to recover under the Sixth Circuit's newly adopted standard of liability, Wilson was entitled to an opportunity to amend. Indeed, other courts have expressly held that before a *pro se* plaintiff's complaint may be dismissed as frivolous under § 1915, the *pro se* plaintiff "*must* be given leave to amend his or her complaint, and some notice of its deficiencies, unless it is *absolutely clear* that the deficiencies of the complaint could not be cured by amendment." *E.g. Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995)(emphasis added); *accord, e.g., Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 454 (3d Cir. 1996)("If an amendment will cure defects in the complaint, it must be permitted ... ."); *Alston v. DeBruyn*, 13 F.3d 1036, 1038 (7th Cir. 1994)(district court abused its discretion in dismissing under § 1915 "because Alston raised colorable claims and should have had the opportunity to cure the complaint's shortcomings by amendment.").

The unfairness of denying Wilson the right to amend is particularly egregious in this case. At the time Wilson filed his complaint, there was no hint in the case law that condition-of-confinement claims in-

volving psychological injuries were governed by different standards than condition-of-confinement claims involving other types of injury. This distinction first appeared in *Babcock v. White*, 102 F.3d 267 (7th Cir. 1996), relied upon by the Sixth Circuit in this case. But *Babcock* was decided long after Wilson's complaint was filed. Prior to *Babcock*, even experienced lawyers would have had no reason to believe that they were required to allege anything beyond a psychological injury (perhaps a significant psychological injury) caused by the defendants' deliberate indifference to a serious risk of harm. If *Babcock* is correct, and if Wilson is required to plead something even more "egregious," he should have been given an opportunity to do so.

IV. THE SIXTH CIRCUIT ERRED IN REJECTING WILSON'S CLAIM FOR INJUNCTIVE RELIEF

The Sixth Circuit rejected Wilson's claim for injunctive relief in *Yaklich* because "Wilson is no longer incarcerated at Mansfield Correctional Institution, where the events that form the basis for his allegations in this case took place." (Slip op., p. 6) But the Sixth Circuit's holding is directly contrary to this Court's holding in *Helling v. McKinney*, 509 U.S. 25 (1993).

In *Helling*, a prisoner alleged that prison officials violated the Eighth Amendment by exposing him to a risk of health problems caused by environmental tobacco smoke. *Id.* at 27-28. The plaintiff sought injunctive relief, and this Court held that the plaintiff should be given an opportunity to prove his need for such relief even though he had been moved from one prison, where he shared a cell with a five-pack-a-day smoker, to another prison where strict restrictions on

smoking had been imposed. Although the Court recognized that these developments might "make it impossible" for the plaintiff to prove his claim, the Court also recognized the plaintiff was "subject to being moved back [to the old prison] and to being placed again in a cell with a heavy smoker." *Id.* at 35-36. Therefore, the Court held that the plaintiff was entitled to the opportunity to try and prove his claim. *Id.*

For precisely the same reasons, Wilson is entitled to an opportunity to attempt to prove his need for injunctive relief.

CONCLUSION

For the foregoing reasons, Wilson's petition for writ of certiorari should be granted.

Respectfully submitted,

Robert T. Biskup
(Counsel of Record)
Jose L. Patiño
John M. Thomas
Ford Pro Bono Volunteers
Three Parklane Boulevard
Suite 1400 West
Dearborn, MI 48126-2568
(313) 248-7734

Attorneys for Petitioner
Kenneth Jay Wilson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kenneth Jay Wilson,

Plaintiff

vs

Mary Sanford, et al.,

Defendants

Misc. Nos.
1-96-209, 1-96-210,
1-96-211, 1-96-212,
1-96-213, 1-96-214,
1-96-215

ORDER
(Filed Nov. 4, 1996)

Plaintiff, an inmate at the Southern Ohio Correctional Facility, filed seven applications to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) in connection with seven civil suits brought under 42 U.S.C. § 1983. A prisoner's right to proceed *in forma pauperis* has now been restricted by Congress. In accordance with section 804(d) of the recently-enacted Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, amending 28 U.S.C. § 1915:

> (g) In no event shall a prisoner bring a civil action or a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is

> under imminent danger of serious physical injury.

Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, § 804(d).

This Court has previously held that Kenneth Jay Wilson is prevented by the Prison Litigation Reform Act from filing any civil action in this Court *in forma pauperis* since he has filed at least three frivolous actions in this Court in the past. *See Wilson v. Neal*, Misc. Nos. 1-96-187, 1-96-188, 1-96-189, 1-96-190, 1-96-191, 1-96-192, 1-96-193 (S.D. Ohio Oct. 22, 1996) (Beckwith, J.) (Doc. 2).

In the seven complaints now presented for filing there is no claim that plaintiff is under imminent danger of serious physical injury. See Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, § 804(d). Accordingly, plaintiff's applications to proceed *in forma pauperis* are denied.

In accordance with the Prison Litigation Reform Act, the Clerk shall not accept for filing any civil actions brought by Kenneth Jay Wilson without the payment of the required filing fee.

The Court certifies pursuant to 28 U.S.C. § 1915(a) that for the foregoing reasons an appeal of this Order would not be taken in good faith and therefore denies plaintiff leave to appeal *in forma pauperis*. Plaintiff remains free to apply to proceed *in forma pauperis* in the Court of Appeals. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962).

IT IS SO ORDERED.

Date: 11-1-96

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH JAY WILSON, Plaintiff, v. LEWIS E. YAKLICH, et al., Defendants.	CASE NO. 1:95 CV 2434 JUDGE SOLOMON OLIVER, JR. MEMORANDUM OF OPINION AND ORDER (Filed Dec. 22, 1995)

On November 16, 1995, plaintiff *pro se* Kenneth Jay Wilson filed the above-captioned *In forma pauperis* action under 42 U.S.C. § 1983 against Lewis E. Yaklich, Dennis Baker, Reginald A. Wilkinson, Shirley Pope, George V. Voinovich, Jane Doe, and John Doe Nos. 1-9. While unclear, the complaint appears to assert that defendants violated plaintiff's right not to be subjected to cruel and unusual punishment because he was found to have violated an institutional rule. For the reasons stated below, this action is dismissed pursuant to 28 U.S.C. § 1915(d).

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the district court has discretion to dismiss an *in forma pauperis* claim as frivolous under section 1915(d).[1] A claim is frivolous if it

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[1] 28 U.S.C. § 1915(d) states, in pertinent part:

> The court . . . may dismiss the case . . . if satisfied that the [*in forma pauperis*] action is frivolous or malicious.

A frivolous *in forma pauperis* claim may be dismissed *sua sponte*, without prior notice to the plaintiff and without service

lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990). This action lacks an arguable basis in law.

As a threshold matter, discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of a court-imposed sentence. *Sandin v. Conner*, U.S., 115 S.Ct. 2293 (1995). Although States may, under certain circumstances, create liberty interests protected by the Due Process Clause, the interests are generally limited to freedom from restraint which, while not exceeding the sentence in such a [sic] unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. *Id.* Plaintiff has not asserted how defendants' alleged actions impose an atypical and significant hardship on him.

Further, plaintiff has not set forth facts suggesting that the conditions of his confinement deprived him of "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). Absent allegations of a constitutional violation, this court does not provide judicial review of prison disciplinary proceedings. *Cain v. Lane*, 857 F.2d 1139 (7th Cir. 1988).

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of process on the defendant, if the court explicitly states that it is invoking section 1915(d) and is dismissing the complaint as frivolous. *Spruytte v. Walters*, 753 F.2d 498, 500 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Harris v. Johnson*, 784 F.2d 222, 224 (6th Cir. 1986); *Brooks v. Seiter*, 779 F.2d 1177, 1179 (6th Cir. 1985).

Accordingly, this action is dismissed as legally frivolous under section 1915(d). Further, the court certifies that an appeal from this decision could not be taken in good faith.[2]

IT IS SO ORDERED.

/s/ Solomon Oliver Jr.
SOLOMON OLIVER, JR.
UNITED STATES
DISTRICT JUDGE

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[2] 28 U.S.C. § 1915(a) provides, in pertinent part:

An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH JAY WILSON, Plaintiff, v. LEWIS E. YAKLICH, et al., Defendants.	CASE NO. 1:95 CV 2434 JUDGE SOLOMON OLIVER, JR. JUDGMENT ENTRY (Filed Dec. 22, 1995)

This Court having contemporaneously filed its Memorandum of Opinion in this case, it is therefore ORDERED that this action is dismissed pursuant to 28 U.S.C. § 1915(d). Further, the Court CERTIFIES pursuant to 28 U.S.C. § 1915(a) that an appeal from this decision could not be taken in good faith.

/s/ Solomon Oliver Jr
SOLOMON OLIVER, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH JAY WILSON, Plaintiff, v. LEWIS E. YAKLICH, et al., Defendants.	Case No. 1:95 CV 2434 JUDGE SOLOMON OLIVER, JR. ORDER (Filed Feb. 13, 1996)

On December 22, 1995, this court issued an Order dismissing the above-captioned case pursuant to 28 U.S.C. § 1915(d). The court further certified that any appeal from the decision would be frivolous and could not be taken in good faith. On January 3, 1995, Plaintiff Wilson filed a Motion for Reconsideration (Doc. No. 9) of the court's Order of December 22, 1995. Upon thoroughly reviewing the Plaintiff's Motion for Reconsideration and the arguments made therein, the court finds that Wilson has presented no facts entitling him to relief from judgment in this case. Accordingly, the Plaintiff's Motion for Reconsideration is denied.

Also pending is Wilson's Motion for 20 U.S. Marshal Forms and 20 Summons (Doc. No. 8) filed December 29, 1995, and a Motion for Extension of Time in Which to File the Notice of Appeal (Doc. No. 13) filed January 26, 1995. In light of the court's denial of Wilson's Motion for Reconsideration, his Motion for 20 U.S. Marshal Forms and 20 Summons (Doc. No. 8) is denied, as moot. Wilson's Motion for Extension of Time in Which to File the Notice of Appeal (Doc. No 13) is denied; under Rule

4(a)(4), Fed. R. App. P., Plaintiff's appeal time does not start to run until the date of this order denying his Motion for Reconsideration.

IT IS SO ORDERED.

/s/ Solomon Oliver Jr
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 96-3023	)	
KENNETH JAY WILSON,	)	
Plaintiff-Appellant,	)	
v.	)	
	)	Nos. 96-3023/4323
LEWIS YAKLICH, et al.,	)	
Defendants-Appellees	)	
UNITED STATES OF AMERICA,	)	
Intervenor-Appellee.	)	
Case No. 96-4323	)	
KENNETH JAY WILSON,	)	
Plaintiff-Appellant,	)	
v.	)	
MARY SANFORD, et al.,	)	
Defendants-Appellees.	)	

Appeal from the United States District Courts
for the Northern District of Ohio at Cleveland and the Southern
District of Ohio at Cincinnati.
Nos. 95-02434; 96-00209; 96-00210; 96-00211; 96-00212; 96-00213; 96-00214; 96-00215 – Solomon Oliver and Sandra S. Beckwith, District Judges.

Argued: December 9, 1997

Decided and Filed: June 8, 1998

Before: GUY, NELSON, and DAUGHTREY, Circuit Judges

COUNSEL

ARGUED: Robert T. Biskup, OFFICE OF GENERAL COUNSEL, FORD MOTOR COMPANY, Dearborn, Michigan, Jose L. Patino, OFFICE OF LEAD COUNSEL, FORD PRO BONO VOLUNTEERS, FORD MOTOR COMPANY, Dearborn, Michigan, for Appellant. Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellees. Jeffrey Clair, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington D.C., for Intervenor. **ON BRIEF:** Robert T. Biskup, OFFICE OF GENERAL COUNSEL, FORD MOTOR COMPANY, Dearborn, Michigan, Jose L. Patino, OFFICE OF LEAD COUNSEL, FORD PRO BONO VOLUNTEERS, FORD MOTOR COMPANY, Dearborn, Michigan, John M. Thomas, FORD MOTOR COMPANY, Dearborn, Michigan, Kenneth Jay Wilson, Lebanon, Ohio, for Appellant. Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, Carol Hamilton O'Brien, ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellees. Jeffrey Clair, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Intervenor.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. These two § 1983 cases were consolidated for argument,

and counsel was appointed to represent the plaintiff, Kenneth Jay Wilson, an inmate of the Ohio correctional system who had originally filed the actions *pro se*. One of the cases, *Wilson v. Yaklich*, we now review on the merits, affirming the district court's determination that the claim is frivolous. The other, *Wilson v. Sanford*, we dismiss under the provisions of 28 U.S.C. § 1915(g) of the recently enacted Prison Litigation Reform Act (PLRA), which precludes the filing of in *forma pauperis* (IFP) civil actions by a prisoner who has had similar petitions dismissed as frivolous on three or more prior occasions. In so doing, we reject the plaintiff's argument that the PLRA is unconstitutional, both as applied to him and on its face.

Wilson is a frequent litigator in the federal courts. At the time the briefs were filed in these two cases, the Ohio Attorney General estimated that Wilson had filed a combined total of over 70 cases – seven of them in the Southern District of Ohio and 50 in the Northern District, as well as 17 appeals in this court. Moreover, files kept by the Attorney General indicate that although Wilson has been litigious, he has not been particularly successful – at least eight of his complaints were dismissed as frivolous prior to the enactment of the PLRA, and an additional six have been dismissed since the Act took effect.

I. *Wilson v. Yaklich* (No. 96-3023)

In this case, Wilson appeals from the dismissal of his IFP civil rights action that alleged deliberate indifference by prison officials to threats against Wilson's safety. Specifically, he claims that the defendants, who are employees of the Ohio Department of Correction, "failed to protect

[him] from the possible physical harm that he would have been subjected to had he not done what 'they' said." Although it is difficult to discern on the face of the complaint, it appears that the gist of Wilson's contention is that on two occasions, he received threats from the "Aryan Brotherhood" prison gang and that prison officials failed to take action to protect him. There is no allegation that he actually suffered any harm because of the defendants' conduct or that he is currently threatened with such harm. After a careful review of the record, we conclude that the factual allegations presented in this matter prevent the plaintiff from making an Eighth Amendment claim with even an arguable basis in law. We therefore concur in the conclusion that Wilson's claim is frivolous, and we affirm the judgment of the district court dismissing the complaint.

Congress first enacted an IFP statute in 1892 "to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (citing *Adkins v. E.I. DuPont deNemours & Co.*, 335 U.S. 331, 342-43 (1948)). Recognizing, however, the potential abuses that could result when filing fees and court costs are paid by the public, Congress also enacted 28 U.S.C. § 1915(e)(2)(B)(i), providing that "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that the action or appeal is frivolous or malicious." *See also Brooks v. Seiter*, 779 F.2d 1177, 1179 (6th Cir.1985).

Subsequent court decisions have established "that not all unsuccessful claims are frivolous." *Neitzke*, 490 U.S. at 329. Rather, the provisions of the IFP statute

should be used to dismiss an action only when the claim is "based on an indisputably meritless legal theory," or where a complaint's "factual contentions are clearly baseless." *Id.* at 327. Stated differently, we have held that "an *in forma pauperis, pro se* complaint may only be dismissed as frivolous . . . when the petitioner cannot make any claim with a rational or arguable basis in law or in fact." *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir.1990) (citing *Williams v. Faulkner*, 837 F.2d 304, 307 (7th Cir.1988), *aff'd by Neitzke*).

The plaintiff asserts that his Eighth Amendment right not to be subjected to cruel and unusual punishment has been implicated by the defendants' failure to act in this case. Without question, prison officials have an affirmative duty to protect inmates from violence perpetrated by other prisoners. As the Supreme Court noted in *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), "[h]aving incarcerated persons with demonstrated proclivities for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." (Internal quotation marks and citations omitted.)

Nevertheless, not all injuries suffered by an inmate at the hands of another prisoner result in constitutional liability for prison officials under the Eighth Amendment. Instead, the deprivation alleged "must result in the denial of 'the minimal civilized measure of life's necessities,' " *id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)), and, in prison condition cases such as the one presently before the court, the prison officials must exhibit deliberate indifference to the health or safety of

the inmate. *Id.* Implicit in this standard is the recognition that the plaintiff must allege that he has suffered or is threatened with suffering actual harm as a result of the defendants' acts or omissions before he can make any claim with an arguable basis in Eighth Amendment jurisprudence. Wilson has completely failed to do so in this case.

The plaintiff primarily requests monetary relief from the defendants in the form of compensatory and punitive damages. Requests for damages, however, seek to compensate plaintiffs for past injuries. *See Carey v. Piphus*, 435 U.S. 247, 254-57 (1978). In this case, Wilson advances no allegation that the Aryan Brotherhood actually injured him physically. Nor does he even hint that he has suffered any emotional or psychological injury from the alleged threats. Even if he had claimed a non-physical injury such as fear of assault at the hands of the prison gang, however, monetary damages for such alleged harm would not have been appropriate in *this* Eighth Amendment context. The Supreme Court itself has noted that "*extreme* deprivations are required to make out a conditions-of-confinement claim," *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (emphasis added), as opposed to an excessive force claim. No such egregious failures on the part of prison officials have been established here. Also, as the Seventh Circuit recently concluded in *Babcock v. White*, 102 F.3d 267, 272 (7th Cir.1996):

> However legitimate [the plaintiff's] fears may have been, we nevertheless believe that it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment. [A]

> claim of psychological injury does not reflect the deprivation of "the minimal civilized measures of life's necessities," *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), that is the touchstone of a conditions-of-confinement case. Simply put, [the plaintiff] alleges, not a "failure to prevent harm," *Farmer*, 511 U.S. [at 834] . . . but a failure to prevent exposure to risk of harm. This does not entitle [the plaintiff] to monetary compensation. *See Carey*, 435 U.S. 247, 258-59. ("In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question – just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.").

Clearly, *injunctive* relief may be ordered by the courts when necessary to remedy prison conditions fostering unconstitutional threats of harm to inmates. Wilson's complaint, however, cannot be read to allege an ongoing constitutional violation by these defendants because Wilson is no longer incarcerated at Mansfield Correctional Institution, where the events that form the basis for his allegations in this case took place. Consequently, any claim for *injunctive* relief against the defendants in their official capacities is also unavailing.

Finally, to the extent Wilson's complaint could be liberally construed to raise also a due process challenge to the conduct or attitudes of the prison officials, the plaintiff has again failed to raise any possibility that appropriate facts or circumstances could be alleged that

would justify relief. First, the law is well-settled that transfer to another institution generally does not implicate a protected liberty interest of the prisoner. *Sandin v. Conner*, 515 U.S. 472, 478 (1995); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Furthermore, the fact that Wilson was subjected to prison discipline for "refusing to lock in the general population area" does not raise due process concerns. In order to raise such a claim, the plaintiff must allege that the prison regulations imposed an "atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. This Wilson did not and could not do.

Thus, because Wilson could not, even through amendment of his pleadings, truthfully allege the existence of any injury justifying relief under established Eighth or Fourteenth Amendment jurisprudence, the legal theories advanced by the plaintiff must be considered "indisputably meritless." The district court, therefore, appropriately termed the plaintiff's complaint "frivolous" and dismissed it pursuant to the provisions of 28 U.S.C. § 1915(e)(2)(B)(i).

Our determination that Wilson's action is frivolous effectively terminates the appeal in Case No. 96-3023. There is, therefore, no need to address in Case No. 96-3023 the question raised on Wilson's behalf concerning the constitutionality of PLRA provisions, because the case can be resolved without resort to constitutional analysis.

II. *Wilson v. Sanford* (No. 96-4323)

It is the second of Wilson's two cases that requires constitutional analysis of the so called "three-strikes"

provision in 28 U.S.C. § 1915(g). The literal language of that portion of the PLRA forbids almost all attempts by indigent prisoners to gain access to the federal courts in civil actions if the litigant has, on three prior occasions, had a case dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. Finding his access to the federal courts restricted as a result of the statute, plaintiff Wilson appeals from the district court's dismissal of seven civil claims and raises challenges to the retroactive application of the provisions of § 1915(g) and to the constitutionality of the law.

On April 26, 1996, President Clinton signed into law the Prison Litigation Reform Act of 1995. Part of that legislation, later codified at 28 U.S.C. § 1915(g), and now popularly known as the "three strikes" provision, states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

In this case, Wilson moved on November 4, 1996, to be allowed to take advantage of the IFP provisions of 28 U.S.C. § 1915 to file seven civil cases against Ohio state employees under 42 U.S.C. § 1983. Because Wilson had previously filed at least three civil actions that had been termed "frivolous," and because the plaintiff did not allege that he was then under an imminent danger of

serious physical injury, the district court ordered that the clerk "not accept for filing any civil actions brought by Kenneth Jay Wilson without the payment of the required filing fee." The plaintiff now appeals that determination to this court.

A. Retroactive Application of the Statute

As a preliminary matter, Wilson argues that the provisions of § 1915(g) are inapplicable to this dispute because any "strikes" occurring prior to the effective date of the PLRA cannot be counted against him in his effort to prosecute his § 1983 causes of action. The State of Ohio counters by contending that this court need not resolve the retroactivity issue at this time, because at least three prior civil actions filed by the plaintiff *after* April 1996 were dismissed by federal courts for failure to state a proper claim. In support of its argument, the State refers to the decision in *Wilson v. Neal*, Nos. MS1-96-187 through MS1-96-193 (S.D.Ohio, Oct. 22, 1996), and maintains that the district court in that matter, *after* the enactment of the PLRA, dismissed six suits for failure to state a claim upon which relief could be granted.

Contrary to the State's assertion, however, the district court in *Wilson v. Neal* did not *dismiss* six actions for failure to state a claim. Rather, the court, recognizing that at least three even earlier civil actions filed by Wilson had been dismissed as frivolous, ordered that the *Wilson v. Neal* complaints not be accepted for filing by the clerk. Hence, the *Wilson v. Neal* actions were never filed, could not have been dismissed as frivolous, and cannot serve as post-PLRA justification for the invocation of § 1915(g)

sanctions. Because the three *pre*-PLRA cases that served as the basis for the *Wilson v. Neal* ruling do fall within the parameters of § 1915(g), however, we must determine whether the provisions of the statute may be applied retroactively to foreclose the plaintiff's claims.

Any such retroactivity analysis begins with the Supreme Court's pronouncement in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). In that decision, the Court outlined the proper procedure for determining whether a statute's reach may be extended to situations predating the legislation by explaining:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

The language of § 1915(g) broadly refers to actions dismissed on "prior occasions." Moreover, Congress's intent to curb frivolous prisoner litigation would not be furthered by interpreting the statutory command to apply only after a litigious prisoner files what may amount to

three *additional* frivolous appeals. Nevertheless, the statute still "lacks 'the kind of unambiguous directive' that clearly shows Congress intended § 1915(g) to apply to suits dismissed prior to its enactment." *Green v. Nottingham*, 90 F.3d 415, 419 (10th Cir.1996) (quoting *Landgraf*, 511 U.S. at 263.

Absent an express prescription by Congress of a statute's proper reach, we proceed to the second step of the *Landgraf* analysis and determine whether the provision actually has a retroactive effect. Ordinarily, "[b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Landgraf*, 511 U.S. at 275. All other circuits that have addressed this issue have concluded that § 1915(g) is, in fact, just such a procedural rule and thus may be applied to cases filed prior to the effective date of the PLRA. *See Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir.1997); *Keener v. Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 144-45 (3d Cir.1997); *Adepegba v. Hammons*, 103 F.3d 383, 385-86 (5th Cir.1996); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir.1996); *Green*, 90 F.3d at 419-20.

Additionally, courts have held that § 1915(g) does not alter the merits of the underlying actions. *Green*, 90 F.3d at 420. To the extent that § 1915(g) does attach additional consequences to past actions, moreover, those consequences are not matters of substance, but only of the procedure required to pursue future claims. *Adepegba*, 103 F.3d at 386. Also, the courts have noted that, even prior to enactment of the PLRA, prisoners were liable for the costs of suits filed, although the collection of those costs was

deferred. Furthermore, the federal courts themselves have long been authorized to revoke a prisoner's ability to proceed *in forma pauperis* upon determining that the litigant was taking unfair advantage of IFP procedures. Thus, "[t]he 'three strikes' provision merely codifies an existing practice in the courts designed to prevent prisoners from abusing the [IFP] privilege," and "does not impose new or additional liabilities, but instead requires collection of a fee that was always due." *Id.* at 386-87.

We see no reason to depart from the analysis adopted by other circuits that have addressed the retroactivity issue, and we thus hold that dismissals of previous actions entered prior to the effective date of the PLRA may be counted toward the "three strikes" referred to in 28 U.S.C. § 1915(g). After determining that the "three strikes" provision applies to Wilson's present filings, we must now examine the plaintiff's constitutional challenges to the operation of § 1915(g).

B. Equal Protection Challenge

Wilson first argues that § 1915(g) infringes upon the protections afforded him by the constitution's Equal Protection Clause. Specifically, he argues that he, as an indigent prisoner, is treated differently than other litigants in prosecuting § 1983 claims, and that § 1915(g) infringes upon his fundamental constitutional right of access to the courts for redress of grievances.

Initially, it must be re-emphasized that "[t]he Supreme Court has recognized that '[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.' " *Washington v. Reno*, 35 F.3d

1093, 1099 (6th Cir.1994) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)). Prisoners like Wilson, therefore, may invoke constitutional safeguards as may other individuals whose freedom is not restrained by the power of the government. Moreover, this court utilizes the same method of analysis in responding to the plaintiff's equal protection claim as it does in other contexts. Consequently, "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The plaintiff claims that he is now treated differently than non-indigent prisoners or indigent non-prisoners as a result of the application of § 1915(g). Because neither indigents nor prisoners are a suspect class, however, *Harris v. McRae*, 448 U.S. 297, 323 (1980); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir.1997), such differentiation is permissible as long as even a rational basis for the differing treatment can be shown. *United States v. Kras*, 409 U.S. 434, 446 (1973).

This court has held that "[d]eterring frivolous prisoner filings in the federal courts falls within the realm of Congress's legitimate interests. . . . " *Hampton*, 106 F.3d at 1287. In an effort to lessen the crush of such filings on the courts, Congress has concluded that prisoners who are not under threat of immediate harm and who have, on at least three prior occasions, filed frivolous lawsuits should be barred, not from ever filing another law suit in federal

court, but merely from instituting such claims at additional expense to the taxpayers. Such a differentiation between indigent and non-indigent litigants has a rational basis.

Likewise, the further differentiation between prisoners and non-prisoners also has a rational basis. As the Fifth Circuit explained in *Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir.1997):

> Prisoners have substantially more free time than do non-prisoners and are provided with food, housing, paper, postage, and legal assistance by the government. *See Roller [v. Gunn]*, 107 F.3d [227,] 234 [(4th Cir.1997)].
>
> Furthermore, "pro se civil rights litigation has become a recreational activity for state prisoners," *Gabel v. Lynaugh*, 835 F.2d 124, 125 n. 1 (5th Cir.1988) (per curiam), and prisoners have abused the judicial system in a manner that non-prisoners simply have not.

Consequently, even though we might not believe the solution advanced by Congress to be the best possible, or even a prudent, response to the problem presented, the legislation cannot be deemed violative of the Equal Protection Clause on the basis of differing treatment of these diverse groups.

Wilson also contends that § 1915(g) contravenes equal protection principles because it interferes with his fundamental constitutional right of access to the courts. The Supreme Court has consistently recognized the existence of such a right, *Lewis v. Casey*, 116 S.Ct. 2174, 2179 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977), and this court has noted that the right is indeed "fundamental."

Ward v. Dyke, 58 F.3d 271, 275 (6th Cir.1995). The access to be afforded the inmate must, moreover, be "adequate, effective, and meaningful." *Hampton*, 106 F.3d at 1284 (citing Bounds, 430 U.S. at 822.)

Both as written and as applied in this case, § 1915(g) does not infringe upon the fundamental right of access to the courts. The plaintiff, despite being barred from bringing his present § 1983 claims in federal court as an indigent, still had available to him at the time of the initial filing the opportunity to litigate his federal constitutional causes of action *in forma pauperis* in state court. *See Patsy v. Board of Regents of Florida*, 457 U.S. 496, 506-07 (1982). As long as a judicial forum is available to a litigant, it cannot be said that the right of access to the courts has been denied. *Hampton*, 106 F.3d at 1285.

C. Due Process Challenge

Wilson next argues that the alleged denial of access to the courts violates a fundamental right guaranteed by substantive due process principles. He contends that distinctions drawn in § 1915(g) between prisoners and non-prisoners, and between indigents and non-indigents are arbitrary, and also insists that the determination that only three prior dismissals of prison suits will trigger the statute's sanctions was arbitrary and capricious as well.

As discussed previously in reference to the plaintiff's equal protection challenges, Wilson cannot demonstrate in this case a denial of his right to access the courts. All claims pursued by the plaintiff in his underlying causes of action could have been filed in Ohio's state courts even if federal law precluded the exercise of district court

jurisdiction. Absent a showing by the plaintiff that Ohio law or Ohio court rules also prevented him, as an indigent prison litigant, from pursuing his claims, we need not engage in further analysis of Wilson's access-to-courts argument.

Furthermore, again for reasons discussed in the equal protection analysis above, any distinctions drawn by the legislation are rationally related to the congressional objective of lessening the number of frivolous prison suits prosecuted at taxpayers' expense. Unquestionably, other cures for the problem could have been tried and might have been better suited to the ultimate purpose of the legislation. The fact that Congress does not choose the most logical or best solution in any given situation does not mean, however, that the chosen antidote is arbitrary, capricious, or fundamentally unfair.

Finally, Congress's decision to bar the filing of IFP prisoner claims after only three dismissals of the plaintiff's prior causes of action on grounds of legal inadequacy, frivolousness, or malice does not implicate due process principles. A legislative body may rationally and appropriately presume that three such dismissals are indicative of a propensity to abuse the court system. Once more, as long as other avenues are available to IFP prison litigants to air meritorious grievances before the courts, the provisions of 28 U.S.C. § 1915(g) do not contravene substantive due process principles.

D. Bill of Attainder Challenge

Wilson next insists that the enactment of § 1915(g) constitutes passage of a bill of attainder prohibited by the

explicit provisions of Article I, § 9, cl. 3 of the United States Constitution. The Supreme Court has defined a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984). We have thus recognized that "there are three essential elements to a bill of attainder: 'specificity . . . punishment, and lack of a judicial trial.' " *Zilich v. Longo*, 34 F.3d 359, 362 (6th Cir.1994) (quoting *Selective Serv. Sys.*, 468 U.S. at 847).

In § 1915(g), Congress does not specify particular individuals for punishment, but rather defines a group – indigent prisoners seeking to file civil actions after having had at least three prior cases dismissed as frivolous, malicious, or failing to state a claim – that is subject to the directives of the legislation. The wording and import of § 1915(g), moreover, satisfies neither of the remaining elements of bills of attainder. First, the statutory subsection is unquestionably civil in its effect and may never impact most members of the group targeted by its provisions. As a result, it cannot be considered "punishment." Second, the statute does not operate to the disadvantage of targeted group members in the complete absence of judicial intervention. Only after a judicial tribunal determines that three separate filings by an indigent, incarcerated litigant are so meritless as to fail to present even a chance of success may the statute's sanctions be imposed. Under such circumstances, we do not find that § 1915(g) constitutes a bill of attainder.

E. Ex Post Facto Challenge

As his final issue, Wilson contends that the "three strikes" provision of the PLRA should be invalidated as unconstitutional *ex post facto* legislation. We have unambiguously determined, however, that *ex post facto* principles have no application in civil contexts, but instead apply only to punitive legislation. *Campos v. INS*, 16 F.3d 118, 122 (6th Cir.1994) (citing *Galvan v. Press*, 347 U.S. 522, 531-32 (1954)); *Gardner v. City of Columbus, Ohio*, 841 F.2d 1272, 1280 (1988). The provisions of § 1915(g), by their very terms, apply only to the filing of civil actions and, while they may impact individuals incarcerated in the criminal justice system, are procedural in nature and were not enacted to affect the punishments already meted out for crimes. They do not, therefore, fun afoul of the prohibition on *ex post facto* legislation. *United States v. Knipp*, 963 F.2d 839, 844 (6th Cir.1992). Here, as in *Hopt v. Utah*, 110 U.S. 574, 589-90 (1884) (quoted in *Dobbert v. Florida*, 432 U.S. 282, 294 (1977)), "[t]he crime for which the . . . defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute."

CONCLUSION

We have recognized that the right of access to the courts is fundamental. To the extent that any provisions of 28 U.S.C. § 1915(g) restrict the right to have arguably meritorious claims reviewed, those provisions could be deemed unconstitutional. In this case, however, Wilson has failed to show that he has been deprived of all court

access as a result of his indigency. Section 1915(g) does not, therefore, unconstitutionally infringe upon his equal protection or due process rights to petition the courts for review in this matter. All other constitutional claims raised by the plaintiff are also without merit. We therefore AFFIRM the judgment of the district court dismissing Wilson's underlying § 1983 claims, in No. 96-3023 as frivolous and in No. 96-4323 as barred by provisions of the PLRA.

96-3023/4323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 96-3023 KENNETH JAY WILSON, Plaintiff-Appellant, v. LEWIS YAKLICH, ET AL., Defendants-Appellees, UNITED STATES OF AMERICA, Intervenor-Appellee.	ORDER (Filed July 27, 1998)
CASE NO. 96-4323 KENNETH JAY WILSON, Plaintiff-Appellant, v. MARY SANFORD, ET AL., Defendants-Appellees.	

BEFORE: GUY, NELSON, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk lu

United States District Court
Northern District of Ohio
Eastern Division

KENNETH JAY WILSON, Plaintiff, vs. LEWIS E. YAKLICH John Doe No. 1 John Doe No. 2 John Doe No. 3 John Doe No. 4 John Doe No. 5 John Doe No. 6 John Doe No. 7 John Doe No. 8 John Doe No. 9 Ma Droulliard Jane Doe No. 1 Richard Hall Dennis Baker Reginald A. Wilkinson Shirley Pope George U. Voinovich Defendants	CASE No. 195CV 2434 CIVIL RIGHTS COMPLAINT (42 USC 1983 & 1985) (Filed Nov. 16, 1995)

1.) Plaintiff, at all times relevant to this action, has been an inmate incarcerated at the Mansfield Correctional Institution. (MANSCI)

2.) Defendants, and each one of them, are employees of the Ohio Department of Rehabilitation and Correction; they are being sued each for damages in their individual capacity and for injunctive relief in their official capacity.

3.) Plaintiff brings this action pursuant to 42 USC 1983 and 1985; Jurisdiction is properly asserted pursuant to 28 USC 1331 and 1343, with venue pursuant to 28 USC 1341(d).

4.) On or about April 7, 1994 and on June 9, 1994, Plaintiff, while being housed at the Mansfield Correctional Institution, was forced into refusing to lock in the general population area, because inmates from the "Aryan Brotherhood" were forcing inmates into refusing to lock, and with the defendants knowledge of such actions, violated Plaintiff's Eighth and Fourteenth Amendments to be free from the ban on Cruel and Unusual Punishment without due process of law.

5.) On or about April 7, 1994, Defendant John Doe No. 5, the Shift Captian [sic] for Second Shift, was notified of Plaintiff's situation, but did nothing to investigate it.

6.) On or about April 7, 1994, Defendant John Doe No. 6, acting as Administrative Review Officer, approved of the change, but did nothing than that.

7.) On or about April 9, 1994, Defendant John Doe No. 7, acting as Hearing Officer, heard the Plaintiff on the charge and referred Plaintiff to the Rules Infraction Board (RIB), but did nothing more than that.

8.) On or about April 11, 1994, Defendants (Lt. Hinard), Chairman of RIB, and John Doe No. 9 and John Doe No. 10, RIB Members, found the Plaintiff guilty and sanctioned the Plaintiff with seven (7) days disciplinary control.

9.) On or about June 9, 1994, Plaintiff was, again, forced into refusing to lock in the general population area while at MANSCI in which Plaintiff did not receive a ticket on, nor a hearing on.

10.) On or about June 18, 1994, Plaintiff had requested protective custody by and through Defendant Yaklich, Unit Case Manager, who interviewed the Plaintiff and told Plaintiff that he knew what happened, and wanted to know whether or not Plaintiff would sign a statement.

11.) On or about July 11, 1994, was brought before Defendant's Droulliard, acting as Chairman and Defendant Jane Doe No. 1, an P.C. Committee Member, who evidently knew that Plaintiff was being transferred back to SOCF, because they did not investigate Plaintiff's reasons for P.C.

12.) Each and every named and unnamed Defendant named herein either implicity [sic] authorized, approved of, or knowingly acquiesied [sic] in concert with those Defendants who came into personal contact in interviewed the Plaintiff.

RELIEF

Wherefore, plaintiff prays that this Court:

A.) Appoint Counsel.

B.) Trial by jury.

C.) Grant Punitive damages in an amount to be shown at trial.

D.) Grant Compensatory damages in an amount to be shown at trial.

E.) Grant Plaintiffs Motion to file reduce number of copies of the Complaint.

F.) Reimburse Plaintiff for all out-of-pocket expenses.

G.) Any and all out-of-pocket expenses.

DATE: 10-31-95

I hereby certify that the above allegations are true and correct to the best of my knowledge.

/s/ Kenneth Jay Wilson
KENNETH JAY WILSON
REG. NO. R148168
P.O. Box 45699
Lulasville, Ohio 45699

United States District Court
Northern District of Ohio
Eastern Division

KENNETH JAY WILSON, Plaintiff,	)	CASE No. 1:95CV-2434
	)	Judge Oliver
vs.	)	
LEWIS E. YAKLICH, ET AL, Defendant.	)	Motion For Reconsiderations
	)	(Filed Jan. 3, 1996)

Now comes the Plaintiff, in pro se, and hereby moves that this Court Reconsider its December 22, 1995, "Memorandum of Opinion and Order," in light of the attached Memorandum In Support.

Respectfully Submitted,

/s/ Kenneth Jay Wilson
KENNETH JAY WILSON
Reg. No. R148168
P.O. Box 45699
Lulasville, Ohio 45699

Memorandum In Support

A) History of this Case

1.) On November 16, 1995, Plaintiff had filed an Civil Rights Complaint, alleging that defendants were deliberate indifferent to Plaintiffs safety when the were aware of the actions of the Aryan Brotherhood actions of forcing inmates, like the Plaintiff, into refusing to lock in General population, which caused the Plaintiff to be

placed in to Security Control, being issued a conduct Report, and found guilty and sanctioned by the RIB.

2.) On December 22, 1995, this court entered an order in which dismissed Plaintiffs complaint because, it as it seems evidence, this court misconstrued Plaintiffs Complaint as alleging that defendants charged him with Rule violations and punish him.

3.) This Court has misconstrued Plaintiffs Complaint all together, and Plaintiff should be allowed to amend his Complaint because, as Plaintiff had attached to his "Motion to File Reduced Number of Copies of Complaint Needed to effectuate Service of Process." A Copy of a *"Filed Grievance and Disposition Herefrom"* which Plaintiff filed with the SOCF Ass't Inspector about why *"SOCF Legal Service"* refused to type the Complaint out in a confidential manner.

Finally, the court explicitly stated that "While Unclear," the Complaint appears to assert that defendants violated Plaintiff's right not to be subjected to Cruel and Unusual Punishment because he was found to have violated an institutional rule." *However,* this was not the Plaintiff's allegations at all, and therefore this Court should instate the Complaint and allow the Plaintiff to file an Amended Complaint, properly alleging, in more specific detail, what he would have alleged had it not been for the "SOCF Legal Services" denial of typing up what would be considered *"Confidential Typing"*.

Respectfully Submitted,

/s/ Kenneth Jay Wilson
KENNETH JAY WILSON

No Certified Copy necessary because Court did not Order Service of Complaint and Summons now.

/s/ Kenneth Jay Wilson
KENNETH JAY WILSON

Supreme Court, U.S.
FILED
DEC 30 1998
OFFICE OF THE CLERK

Case No. 98-715

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

KENNETH J. WILSON

Petitioner

v.

LEWIS YAKLICH, MARY SANFORD, *et al.*
and the UNITED STATES OF AMERICA

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE OHIO RESPONDENTS IN OPPOSITION TO CERTIORARI

BETTY D. MONTGOMERY
Attorney General

STUART W. HARRIS
Assistant Attorney General
Counsel of Record
TODD R. MARTI
Assistant Attorney General
Corrections Litigation Section
140 E. Town Street, 14th Floor
Columbus, Ohio 43215-6001
(614) 644-7233
Counsel for the Ohio Respondents

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42 U.S.C. § 1997e (e) 5

Prison Litigation Reform Act, Pub. No. 104-134,
110 Stat. 1321 (April 26, 1996) 1,2,4,5

STATEMENT OF THE CASE

This petition presents questions as to the extent of injury necessary to sustain a "failure to protect" claim under the Eighth Amendment to the United States Constitution and the applicability and constitutionality of 28 U.S.C. §1915(g), enacted as part of the Prison Litigation Reform Act ("PLRA"), Pub. No. 104-134, 110 Stat. 1321 (April 26, 1996).

The Petitioner is an inmate in the custody of the Ohio Department of Rehabilitation and Correction ("ODRC"). He had pursued more than 70 meritless civil cases and appeals in the federal courts at the time of the decision below. All of the Respondents, except the United States of America, are employees of ODRC. This petition arises out of the Sixth Circuit's consolidated disposition of two of the Petitioner's most recent federal appeals, the cases of *Wilson v. Yaklich*, Case No. 96-3023 (6th Cir.) and *Wilson v. Sanford*, Case No. 96-4323 (6th Cir.).

The *Yaklich* case was commenced in the district court by the Petitioner, *pro se*, prior to the enactment of the PLRA. It alleged, *inter alia*, that while he was incarcerated at the Mansfield Correctional Institution ("ManCI"), the Ohio Respondents were insufficiently sensitive to his fear of assault from other inmates and hence violated the Eighth Amendment. Most notably, it did not allege that he was ever assaulted or physically harmed by the inmates he feared. That complaint sought only damages and did not request injunctive relief. The district court reviewed the Petitioner's complaint, denied him permission to proceed *in forma pauperis* ("IFP") and dismissed his case without prejudice.

After the passage of the PLRA, the Petitioner appealed to the Sixth Circuit. The Respondents moved, pursuant to the newly enacted provisions of 28 U.S.C. §1915(g), to prohibit the Petitioner from pursuing the appeal

IFP. The Sixth Circuit appointed counsel for the Petitioner, and both the merits of his appeal and the applicability and constitutionality of §1915(g) were ably briefed by appointed counsel. His counsel argued, among other things, that §1915(g) could not be applied to his appeal because the case was originally commenced before its enactment and that the statute violates equal protection principles.

The *Sanford* case was commenced after the passage of the PLRA. It was the consolidated disposition of seven separate civil cases which the Petitioner sought to pursue IFP. Because of his long history of filing meritless cases, the district court invoked §1915(g) and denied IFP status. The Petitioner then filed a *pro se* appeal and incorporated by reference the arguments regarding §1915(g) made by his counsel in *Yaklich*.

The *Yaklich* and *Sanford* cases were consolidated for argument and the Petitioner's counsel in *Yaklich* argued on his behalf in both cases.

The Sixth Circuit issued a single opinion resolving both *Yaklich* and *Sanford*. It held that Petitioner's Eighth Amendment claims in *Yaklich* were properly found to be frivolous because he had not alleged any injury and hence the objective element of that claim. (A13-A17). It also held that the district court presiding over *Sanford* did not violate retroactivity principles in relying upon the Petitioner's pre-enactment dismissals to invoke §1915(g) because that statute is strictly procedural and does not significantly change his rights and duties. (A20-A22). It held that §1915(g) did not violate the Petitioner's right of access to the courts because he was still free to seek relief in state fora. In light of that decision, the Sixth Circuit further held that §1915(g) did abridge fundamental rights or rely upon suspect classifications and hence was subject to rational basis review for purposes of the Petitioner's Equal Protection challenge. The court found

that the need to deal with the onslaught of frivolous prisoner petitions provided a rational basis for the statute and hence upheld its constitutionality. (A22-A25).

REASONS FOR DENYING THE WRIT

Petitioner raises three clusters of issues. The first concerns the constitutionality of §1915(g) under Equal Protection principles. The second concerns the statute's retroactivity. The third concerns his underlying Eighth Amendment claim in *Yaklich*. All of those issues have either been conclusively resolved or are otherwise inappropriate for review.

I. The Petitioner's Equal Protection Issues Have Been Conclusively Resolved.

The Petitioner's first issue concerns the standard of review for restrictions that allegedly limit a prisoner's access to the courts. More specifically, he argues that his right to access the courts was "fundamental", that §1915(g) infringes upon that right and hence that §1915(g) should be subject to strict scrutiny. However, there are factual and legal problems with that issue.

Factually, the Sixth Circuit held that under Ohio law the Petitioner had full access to Ohio courts to assert the types of claims he raised in the district courts below. Hence, because there was no infringement, this issue is hypothetical.

Legally, three distinct lines of precedent have already determined the standard of review. As a general matter, this Court has repeatedly held that statutes requiring indigents to pay filing fees are subject to the rational basis review applied below when, as here, they do not interfere with cases concerning criminal or familial matters and do not preclude resort to alternate fora. *M.L.B. v. S.L.T.*, 519 U.S. 102

(1996); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Drawing the matter into sharper focus, this Court has held the government need only "demonstrate a rational basis" to defeat a prisoner's equal protection attack on a challenged restriction. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134 (1977). Bringing the matter into the highest possible resolution, *Lewis v. Casey*, 518 U.S. 343 (1996), expressly held that restrictions on prisoners' ability to access the courts are reviewed under the rational basis test enunciated in *Turner v. Safley*, 482 U.S. 78 (1987). Hence this issue has been settled.

The second issue is in this cluster is whether §1915(g) violates equal protection principles because it does not address all types of frivolous litigation. However, it has been settled for more than half a century that a legislature does not violate equal protection guarantees because it only addresses a portion of the problems confronting it. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Once again, review is contraindicated because the issue has been conclusively resolved.

II. The Petitioner's Retroactivity Issues Are Increasingly Unworthy of Review.

The Petitioner's third issue is the propriety of considering pre-PLRA dismissals in the application of §1915(g) under the retroactivity principles established by *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There are two reasons why it does not merit review. First, the decision below is consistent with that of every other circuit to consider the issue and hence the conflict usually required to justify review of such a statutory question is not present. *Green v. Nottingham*, 90 F.3d 415, 419-420 (10th Cir. 1996); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996); *Adepegba v. Hammons*, 103 F.3d 383, 385-386 (5th

Cir. 1996); *Keene v. Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 144-145 (3rd Cir. 1997); *Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997). Second, this retroactivity issue has, and will, become increasingly irrelevant as time passes since the enactment of §1915(g).

III. The Petitioner's Eighth Amendment Issues Have Either Been Resolved by Subsequent Legislation or Were Not Raised Below.

The Petitioner's fourth issue, whether a prisoner may recover damages on an Eighth Amendment conditions of confinement claim based upon emotional/psychological injury unaccompanied by physical harm, has been resolved by the PLRA. That legislation enacted 42 U.S.C. §1997e(e), which provides that no recovery is possible in such a situation. Consequently, it is exceedingly unlikely that this issue will arise again.

The Petitioner's final issue concerns the availability of injunctive relief in connection with his Eighth Amendment claim. However, that issue is not properly before the Court because it was not raised below. Presumably because he had already been transferred form the *situs* of the perceived threat when he filed in the district court, Petitioner's complaint did not seek injunctive relief. Instead, he only sought damages. Since he did not seek injunctive relief at the outset of this case, the Petitioner cannot raise a constitutional claim on the matter at this late date.

CONCLUSION

The Ohio Respondents ask that this Court deny certiorari in these cases.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

STUART W. HARRIS
Assistant Attorney General
Counsel of Record
TODD R. MARTI
Assistant Attorney General
Corrections Litigation Section
140 E. Town Street, 14th Floor
Columbus, Ohio 43215-6001
(614) 644-7233
Counsel for the Ohio Respondents

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No. 98-715

In the Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH JAY WILSON, PETITIONER

v.

LEWIS YAKLICH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
JOHN C. HOYLE
DOUGLAS HALLWARD-DRIEMEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Section 804(d) of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Title VIII, 110 Stat. 1321-74, amended 28 U.S.C. 1915(g) (Supp. II 1996) to provide:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

The questions presented are:

1. Whether the limitation on *in forma pauperis* filings imposed by Section 1915(g) violates petitioner's rights to due process and equal protection.

2. Whether counting dismissals entered before the enactment of the PLRA toward Section 1915(g)'s three-dismissal limit deprives petitioner of due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-715

KENNETH JAY WILSON, PETITIONER

v.

LEWIS YAKLICH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-29) is reported at 148 F.3d 596. The orders of the district court (Pet. App. 1-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1998. A petition for rehearing was denied on July 27, 1998 (Pet. App. 30-31). The petition for a writ of certiorari was filed on October 26, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has long made special provision for access to the federal courts by individuals who cannot afford to prepay or give security for fees and costs, as other litigants are or may be required to do. See, *e.g.*, 28 U.S.C. 1914 (district court fees); Fed. R. App. P. 7 (appeal bonds). Since 1892, what is now 28 U.S.C. 1915 has permitted any litigant "to commence a civil or criminal action in federal court *in forma pauperis* by filing in good faith an affidavit stating, *inter alia*, that he is unable to pay the costs of the lawsuit." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989); see 28 U.S.C. 1915(a)(1) (Supp. II 1996).[1] A party who is granted leave to proceed *in forma pauperis* (IFP) is not required to prepay ordinary filing or other fees. The United States also pays certain costs in the first instance (whether or not it is a party to the litigation); and the opposing party must accept the likelihood that any judgment for costs against the IFP litigant at the end of the litigation will be uncollectible. See, *e.g.*, 28 U.S.C. 1911-1913, 1920 (taxation of costs).

On April 26, 1996, the President signed the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, § 101(a), Title VIII, 110 Stat. 1321-66. The PLRA made various changes in the nature and availability of IFP status in civil actions and appeals brought by federal or state prisoners. As directly relevant here,

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[1] Unless otherwise noted, all references to Section 1915 in this brief are to the amended version set out in the 1996 Supplement to the United States Code.

Section 804(d) of the Act, 110 Stat. 1321-74, adds to 28 U.S.C. 1915 a new subsection (g):

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Thus, under most circumstances, a prisoner who meets the three-prior-dismissal threshold of Section 1915(g) must now pay the filing fees required of ordinary litigants before he or she may bring a civil action, or appeal a civil judgment, in federal court.

2. *Yaklich.* On November 16, 1995, petitioner, who was then imprisoned at Ohio's Mansfield Correctional Institution, filed a pro se complaint in the United States District Court for the Northern District of Ohio, alleging that respondent Lewis Yaklich and other employees of the Ohio Department of Rehabilitation and Correction had violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. Pet. App. 32-35. The complaint alleged that members of the "Aryan Brotherhood" had, on two occasions, "forced [him] into refusing to lock in the general population area"; and that the defendants, although aware of that situation, did not investigate it, refused to place petitioner in protective custody, and

instead disciplined petitioner.[2] *Id.* at 33-34. The complaint did not allege that petitioner had suffered physical harm, or that he was subject to any continuing threat. *Ibid.*; see *id.* at 13. The complaint sought compensatory and punitive damages. *Id.* at 34-35.

Petitioner sought to file his complaint *in forma pauperis* under 28 U.S.C. 1915 (1994) (before amendment by the PLRA). On December 22, 1995, the district court dismissed the complaint as frivolous, pursuant to 28 U.S.C. 1915(d) (1994) (now Section 1915(e)). Pet. App. 4-6. The court held that petitioner had failed to allege either the imposition of an "atypical and significant hardship" or that "the conditions of his confinement deprived him of 'the minimal civilized measure of life's necessities.'" *Id.* at 5 (citing *Sandin* v. *Conner*, 515 U.S. 472 (1995), and quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981)). The court further certified that no appeal from its decision could be taken in good faith, thus precluding petitioner from proceeding *in forma pauperis* on appeal. *Id.* at 6-7; see 28 U.S.C. 1915(a) (1994). On February 13, 1996, the court denied petitioner's motion to reconsider. Pet. App. 8-9.

Petitioner filed a notice of appeal and asked the court of appeals for leave to proceed *in forma pauperis* despite the district court's certification. The court subsequently appointed counsel for petitioner and directed the parties to address the relevance of the intervening enactment of the PLRA. In response, petitioner contended that the PLRA's amendments to Section 1915 did not apply to his case, and that if they did apply they violated his constitutional rights to due process and equal protection and impermissibly increased his

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[2] Neither the record below nor the petition elucidates the meaning of the phrase "refusing to lock." See Pet. 3 & n.1.

punishment for previous crimes. The United States thereafter intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the Act.

3. *Sanford.* While the *Yaklich* case was pending on appeal, petitioner, who had been transferred to the Southern Ohio Correctional Facility, filed seven new complaints in the United States District Court for the Southern District of Ohio, alleging violations of 42 U.S.C. 1983 by respondent Mary Sanford and others. See Pet. App. 1. In each case, petitioner sought to proceed *in forma pauperis*. *Ibid.* On November 4, 1996, the district court denied petitioner's IFP applications. *Id.* at 1-3. Noting that it had previously held (in connection with another group of seven IFP complaints) that petitioner had filed "at least three frivolous actions in this Court in the past," and that the present complaints included no claim of imminent physical danger, the court held that, in accordance with Section 1915(g), it would no longer accept petitioner's civil complaints for filing unless they were accompanied by the ordinary filing fee. *Id.* at 2.[3]

The court of appeals consolidated petitioner's appeal from the denial of his IFP applications in *Sanford* with his previous appeal on the merits in *Yaklich*.

4. The court of appeals affirmed the dismissal of the complaint in *Yaklich* because it concurred in the district court's conclusion, under pre-PLRA Section 1915(d), that the action was frivolous. Pet. App. 13, 17. The court accordingly did not address petitioner's chal-

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[3] The complaints were not ultimately accepted for filing, and the district court's order indicates only that they invoked 42 U.S.C. 1983 and did not allege imminent physical danger. Pet. App. 1-2. The record offers no further indication of the substance of the underlying claims in the *Sanford* litigation.

lenges to the applicability or constitutionality of the PLRA in connection with that case. *Id.* at 17.[4] The court did, however, reach and resolve those claims in affirming the district court's rejection of petitioner's applications to proceed *in forma pauperis* in connection with the seven new complaints at issue in *Sanford*. *Id.* at 17-29.

a. The court first rejected (Pet. App. 19-22) petitioner's argument that the "three strikes" provision of Section 1915(g) should not be applied "retroactively" to his case "because any 'strikes' occurring prior to the effective date of the PLRA cannot be counted against him in his effort to prosecute his § 1983 causes of action" (*id.* at 19). Applying the analytical framework of *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court first determined that the PLRA contains no "unambiguous directive" that pre-Act dismissals should be counted for purposes of Section 1915(g). Pet. App. 21. The court further concluded, however, that counting such dismissals would not produce any genuinely "retroactive" effect. *Id.* at 21-22. Rather, the court joined "[a]ll other circuits that have addressed this

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[4] Because the United States intervened in *Yaklich* only for the purpose of defending the constitutionality of the PLRA, we do not address in any detail the court of appeals' non-constitutional grounds for affirming dismissal of the complaint in that case. Briefly, the court held that the complaint failed to allege that petitioner "has suffered or is threatened with suffering actual harm as a result of the defendants' acts or omissions" (Pet. App. 15), and that no injunctive relief could be proper because petitioner had already been transferred from the facility where the actions complained of allegedly occurred (*id.* at 16). To the extent the complaint raised a due process claim, the court held that petitioner had not alleged that prison regulations imposed an "'atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'" *Id.* at 17 (quoting *Sandin*, 515 U.S. at 484).

issue" in holding that Section 1915(g) is not improperly "retroactive" because it is a "procedural rule," "does not alter the merits of the underlying actions," does not impose new liability for court costs (for which prisoners were always ultimately liable), and merely "codifies an existing practice in the courts designed to prevent prisoners from abusing the [IFP] privilege." *Ibid.*

b. The court next rejected (Pet. App. 22-25) petitioner's argument that 28 U.S.C. 1915(g) violates equal protection principles by treating indigent prisoners differently from either non-indigent prisoners or indigent non-prisoners. Noting that "neither indigents nor prisoners are a suspect class," the court inquired only whether there is a "rational basis" for the distinctions drawn by the statute. Pet. App. 23. The distinction between indigent and non-indigent prisoners, the court observed, is rationally related to the legitimate goal of deterring frivolous lawsuits by declining to subsidize them at taxpayer expense. *Id.* at 23-24. The distinction between prisoners and non-prisoners, the court held, is rationally related to the greater free time of prisoners, the attraction of civil litigation as a "recreational activity" for prisoners, and the empirical observation that "prisoners have abused the judicial system in a manner that non-prisoners simply have not." *Id.* at 24.

The court of appeals also held (Pet. App. 24-25) that the PLRA does not unduly interfere with petitioner's "fundamental constitutional right of access to the courts" (*id.* at 24). Noting that access to the courts must be "adequate, effective, and meaningful," the court pointed out that petitioner "still had available to him at the time of the initial filing the opportunity to litigate his federal constitutional causes of action *in forma pauperis* in state court." *Id.* at 25. Thus, the

court concluded, "it cannot be said that the right of access to the courts has been denied." *Ibid.*[5]

ARGUMENT

The court of appeals' conclusions with respect to 28 U.S.C. 1915(g)'s application and constitutionality are correct, and comport with those of all the other courts of appeals that have considered the relevant questions.[6] Those conclusions do not warrant further review by this Court.[7]

1. Petitioner contends (Pet. 15-18) that under the analysis prescribed in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), Section 1915(g) should not be applied "retroactively" by counting pre-PLRA dismissals toward the three-dismissal limit imposed by that Section.[8] The court below correctly joined six

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[5] For the same reasons that it rejected petitioner's equal protection arguments, the court also rejected his argument that enforcement of Section 1915(g) would violate "substantive due process principles." Pet. App. 25-26. Finally, the court rejected arguments based on the Bill of Attainder and Ex Post Facto provisions of the Constitution. *Id.* at 26-28. Petitioner does not renew the latter two contentions in this Court (see Pet. i), and we do not address them.

[6] We have also opposed review in a pending case that raises similar constitutional and "retroactivity" challenges to Section 1915(g). Br. in Opp., *Rivera* v. *United States*, No. 98-6127 (filed Nov. 23, 1998).

[7] As noted above, the United States intervened in the *Yaklich* case only to defend the constitutionality of Section 1915(g)—an issue that the court of appeals ultimately addressed only in connection with the consolidated appeal in *Sanford*. This brief does not address the merits of the court of appeals' determination that the complaint in *Yaklich* was frivolous under pre-PLRA standards.

[8] Although petitioner frames this question in constitutional terms (see Pet. i (Question 3), 15), *Landgraf* is concerned primarily with principles of statutory construction. See 511 U.S. at 266-268,

other courts of appeals in rejecting that argument. Pet. App. 19-22; see *Rivera* v. *Allin*, 144 F.3d 719, 728-730 (11th Cir. 1998), petition for cert. pending, No. 98-6127; *Tierney* v. *Kupers*, 128 F.3d 1310, 1311-1312 (9th Cir. 1997); *Keener* v. *Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 144-145 (3d Cir. 1997) (per curiam); *Adepegba* v. *Hammons*, 103 F.3d 383, 385-387 (5th Cir. 1996); *Abdul-Wadood* v. *Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996); *Green* v. *Nottingham*, 90 F.3d 415, 418-420 (10th Cir. 1996).

Following *Landgraf*, the court of appeals first properly noted that the language and purposes of the PLRA suggest a congressional intention to count pre-Act dismissals for purposes of Section 1915(g). Pet. App. 20-21; see *Landgraf*, 511 U.S. at 280 ("the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach"); *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997) ("normal rules of construction" apply in determining the threshold question of a statute's facial "temporal reach"). Finding in the Act, however, no "unambiguous directive" in this regard, the court proceeded to address other factors discussed in *Landgraf*, and correctly concluded that counting pre-Act dismissals does not result in a disfavored "retroactive" effect. Pet. App. 21-22.

First, the three-dismissal rule does not impair rights petitioner possessed when he filed previous lawsuits that were ultimately dismissed as frivolous. The statu-

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272. Petitioner's remaining "retroactivity" claim (unlike the Bill of Attainder and Ex Post Facto Clause claims he raised in the court of appeals, see note 5, *supra*) is therefore essentially a statutory one. Because a conclusion that petitioner is not subject in this case to the limitations imposed by Section 1915(g) would obviate any need to consider the constitutionality of those limitations, we address that question first.

tory authorization to allow a litigant to proceed *in forma pauperis* was always addressed to the discretion of the courts. See 28 U.S.C. 1915(a) (1994) (court "may" authorize litigant to proceed IFP); *Rivera*, 144 F.3d at 729-730. Certainly petitioner never had any "right" to *abuse* that authorization by using it to file lawsuits that were later determined to be utterly without merit; and the PLRA merely codified the judicial practice of "revok[ing] a prisoner's ability to proceed *in forma pauperis* upon determining that the litigant was taking unfair advantage of IFP procedures." Pet. App. 22; see, *e.g.*, *Adepegba*, 103 F.3d at 387.

Second, Section 1915(g) does not increase petitioner's liability for past conduct, because "even prior to enactment of the PLRA, prisoners were liable for the costs of suits filed, although the collection of those costs was deferred." Pet. App. 21-22; accord *Rivera*, 144 F.3d at 730 ("[l]itigants have always been liable for filing fees"); *Adepegba*, 103 F.3d at 386 ("[Section 1915(g)] requires collection of a fee that was always due."); *Abdul-Wadood*, 91 F.3d at 1025 ("All § 1915 has ever done is excuse *pre*-payment of the docket fees; a litigant remains liable for them.").

Third, to the extent that Section 1915(g) does impose new consequences with respect to past conduct, "those consequences are not matters of substance, but only of the procedure required to pursue future claims." Pet. App. 21; see *Rivera*, 144 F.3d at 730; *Adepegba*, 103 F.3d at 386; *Green*, 90 F.3d at 420. As *Landgraf* made clear, however, "the fact that a new procedural rule was instituted after the conduct giving rise to [a] suit does not make application of the rule at trial retroactive." 511 U.S. at 275. The court of appeals in this case joined its sister circuits in applying the same principle to the new procedural limitation imposed by Section 1915(g),

which is not "retroactive" even though its (prospective) application in the present case depends on conduct (previous frivolous filings) that occurred before its enactment. Pet. App. 21 (citing cases); see also *Landgraf*, 511 U.S. at 270 n.24 ("[A] statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'"). That conclusion, which is of essentially transitional significance, is correct and requires no further review.

2. The court of appeals also correctly rejected petitioner's constitutional argument (Pet. 9-15) that the application of 28 U.S.C. 1915(g) to his case violates his right to equal protection. Pet. App. 22-25. Every other court of appeals that has considered a similar challenge has likewise upheld the constitutionality of the limits that Section 1915(g) imposes on the continued use of *in forma pauperis* status by prisoners with a demonstrated history of meritless civil litigation. See *Rodriguez* v. *Cook*, No. 97-35095 (9th Cir. Dec. 16, 1998); *White* v. *Colorado*, 157 F.3d 1226, 1234-1235 (10th Cir. 1998); *Rivera*, 144 F.3d at 727-728; *Carson* v. *Johnson*, 112 F.3d 818, 821-822 (5th Cir. 1997).

The court of appeals properly determined that Section 1915(g), as applied to petitioner, is subject only to rational basis review. See Pet. App. 23-25. Petitioner claims (Pet. 9-11) that the statute is subject to strict scrutiny because it burdens his fundamental right of access to the courts. That argument, however, confuses a fundamental constitutional right of fair and reasonable access to a judicial forum with the different (although sometimes overlapping) *statutory* privilege that Congress has granted most indigent litigants to seek leave to be excused from assuming, in advance, the ordinary processing costs of federal civil litigation.

As this Court recently observed, in "the generality of civil cases, * * * indigent persons have no constitutional right to proceed *in forma pauperis*." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 119 (1996). The Court has recognized only "a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees." *Id.* at 113; see also *id.* at 114 ("[A] constitutional requirement to waive court fees in civil cases is the exception, not the general rule."). In particular, the Court has "set apart from the mine run of cases" those that implicate "fundamental interest[s] or classification[s] attracting heightened scrutiny"—specifically "those involving state controls or intrusions on family relationships," *id.* at 115-116, such as the parental termination proceedings at issue in *M.L.B.*, or the divorce proceedings at issue in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Compare *Ortwein* v. *Schwab*, 410 U.S. 656 (1973) (per curiam) (no constitutional right to proceed IFP in court challenge to administrative reduction of welfare benefits); *United States* v. *Kras*, 409 U.S. 434 (1973) (no right to waiver of fees for discharge in bankruptcy).

In this case, the court of appeals properly applied "the general rule * * * that fee requirements ordinarily are examined only for rationality." *M.L.B.*, 519 U.S. at 123. Although neither the record nor the petition discloses the precise nature of the claims petitioner sought to make in the seven new lawsuits at issue in the *Sanford* proceeding, petitioner's history of frivolous litigation (see Pet. App. 2, 4-6, 19-20) plainly differentiates this case from *M.L.B.*, which involved one parent's effort to *defend* against the other's effort to terminate parental rights (see 519 U.S. at 107, 125), or *Boddie*, which involved access to state courts to invoke their

exclusive jurisdiction to terminate a marriage. Section 1915(g)'s limitation on the general statutory right to proceed *in forma pauperis*—which indigent prisoners normally enjoy in common with all other indigent litigants—applies only to prisoners who have, over time, demonstrated a propensity for abuse of that right, to the detriment of the courts, defendants, federal taxpayers, and other litigants. That statutory limit is merely a regularized, legislative version of a prerogative that this Court, among others, has periodically exercised in the face of demonstrated abuse of its processes. See, *e.g.*, *Shieh* v. *Kakita*, 517 U.S. 343 (1996); *Rodriguez*, slip op. 13846; *Adepegba*, 103 F.3d at 387; Pet. App. 22.

In situations that do involve the most fundamental of interests—where a prisoner faces "imminent danger of serious physical injury"—Section 1915(g) itself provides for the continued availability of IFP status. And, as the court of appeals pointed out (Pet. App. 25-26), so far as appears in this case, Section 1915(g) does not under any circumstances deprive petitioner of all access to a judicial forum, because he remains free to litigate his claims (which appear to be against state officials) under 42 U.S.C. 1983 *in forma pauperis* in state court. See *Howlett* v. *Rose*, 496 U.S. 356, 358 (1990) ("State courts as well as federal courts have jurisdiction over § 1983 cases."); compare *Boddie*, 401 U.S. at 376, 380 (state-court filing fee deprived petitioner of her "only avenue" and "sole means" to obtain divorce); *M.L.B.*, 519 U.S. at 125 (effort to "defend against the State's destruction of her family bonds" in state court proceeding was comparable to "a defendant resisting criminal conviction"); *id.* at 116 n.8, 127-128; *Kras*, 409 U.S. at 445 ("In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal

relationship with his creditors."); cf. *Ortwein*, 410 U.S. at 659-660 (administrative hearing was available to welfare recipients at no cost before they could be denied benefits); *Kadrmas* v. *Dickinson Pub. Sch.*, 487 U.S. 450, 460-461 (1988) (upholding fee for transport to public schools, and distinguishing court-access cases on the ground that the court remedies were exclusive).[9] Under these circumstances, the modest limitations imposed by Section 1915(g) impose no undue burden on the fundamental right of reasonable access to the courts, and the court of appeals correctly held that those limitations do not deprive petitioner of equal protection or due process so long as they are rationally related to any legitimate state purpose.

Section 1915(g) easily passes muster under that standard. The court of appeals properly recognized—as have other courts—that the goals of curtailing abusive prisoner litigation and conserving governmental (including judicial) resources are legitimate government purposes. Pet. App. 23-24; see *Rodriguez*, slip op. 13847-13848; *White*, 157 F.3d at 1234; *Rivera*, 144 F.3d at 727; *Carson*, 112 F.3d at 822. Denying the benefit of IFP status in all but the most serious cases to prisoners who have in the past repeatedly filed lawsuits that proved, on examination, to be meritless is a rational

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[9] Ohio law permits indigent prisoners to pursue non-frivolous suits in state court without pre-payment of court fees and costs. See Ohio Rev. Code Ann. § 2969.22 (Anderson 1996 & Supp. 1998). Ohio recently adopted a screening process in order to reduce the number of frivolous prisoner filings. See *id.* §§ 2969.24 (court may dismiss frivolous inmate suits against government entities or employees), 2969.25 (court may appoint attorney to review claim and make recommendation as to frivolousness). Petitioner acknowledges the propriety of such case-by-case determinations. See Pet. 13, 17-18.

means to advance those legitimate ends. Any differentiation that results between indigent and non-indigent prisoners simply reflects Congress's measured decision not to bar further filings by abusive inmates, but simply to cease subsidizing them; and any distinction made between prisoners and non-prisoners reflects a reasonable legislative determination that prisoners are more prone to abuse the availability of IFP status, in part because they often have substantially more free time than non-prisoners to devote to litigation, and because for some pro se litigation "has become a recreational activity." Pet. App. 23-24; see, *e.g.*, *Rodriguez*, slip op. 13847; *Rivera*, 144 F.3d at 728 ("Congress did not enact the PLRA in a vacuum. It held hearings and rendered findings, concluding that prisoners file more frivolous lawsuits than any other class of persons."); see also *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of [a] problem which seems most acute to the legislative mind.").

The court of appeals thus correctly rejected petitioner's constitutional challenges to the application of Section 1915(g) in his case. In the absence of any conflict in the courts of appeals, that decision does not warrant review by this Court.

CONCLUSION

With respect to the first three questions presented by the petition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
JOHN C. HOYLE
DOUGLAS HALLWARD-DRIEMEIER
Attorneys

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